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IN THE

Supreme Court of the United States

October Term, 1968

No. 122

BETTY GANNETT TORMEY, *Petitioner,*

v.

IMMIGRATION & NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY FOR PETITIONER

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1. Jurisdiction

The Service agrees that the six months time bar of section 106(a) on petitions for review of deportation orders should not be construed literally, and that the bar may be lifted by a motion for reconsideration or rehearing (Br. 11-13). It argues, however, that this should be the case only when the motion is filed within six months of the issuance of the final deportation order (*ibid.*). It states (Br. 11)

that it intended its concession in *Woodby* v. *Immigration & Naturalization Service,* 385 U.S. 276, to be so limited.[1]

The limitation proposed by the Service flies in the face of the long-established rule governing the time for filing an appeal or petition for review. The rule is that a motion for reconsideration or rehearing, although filed after expiration of the statutory period within which to apply for review of the underlying order, operates to extend that period, provided only that the motion is seasonably filed under the rules of the body to which it is addressed or—if filed out of time—is entertained by that body. *United States* v. *Seminole Nation,* 299 U.S. 417, 419-21; *Bowman* v. *Loperena,* 311 U.S. 262, 265-66 (cited with approval in *United States* v. *Healy,* 376 U.S. 75, 78); *Texas & Pacific Ry. Co.* v. *Murphy,* 111 U.S. 488; *Wayne Gas Co.* v. *Owens Co.,* 300 U.S. 131, 136-38; *Brockett* v. *Brockett,* 2 How. 238; *Railroad Co.* v. *Bradleys,* 7 Wall. 575, 577-78.

Petitioner's motion for reconsideration was seasonably filed under the regulations of the Attorney General which permit such motions to be made at any time prior to the alien's departure (Pet. 3, 7). Hence, under the rule of the foregoing cases, the validity of the order for petitioner's deportation was open for review on her petition for review in the court below.

The Service relies on *Bregman* v. *Immigration & Naturalization Service, supra,* for the rule which it proposes. There the motion to reopen was filed within six months of the deportation order, and review sought within six months after denial of the motion. *Bregman* held (at 402) that, "It

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[1] The Service says (Br. 11) that this intention—though not stated in its *Woodby* brief—is inferable from the citation of *Bregman* v. *Immigration & Naturalization Service,* 351 F.2d 401. The inference evidently escaped at least one member of the Court (Justice Clark, dissenting in *Woodby,* at 291) as it did counsel for petitioner here.

follows from *Giova*"[2] that the court had jurisdiction to review the validity of the deportation order. *Bregman* did not, and had no occasion to, consider what would have followed from *Giova* had the motion to reopen been filed *more* than six months after entry of the deportation order. Plainly, however, under *Giova*, the *Seminole Nation* line of cases, *supra*, and the regulations of the Attorney General, this circumstance would not have affected the scope of review.[3]

The Service denigrates petitioner's motion for reconsideration as "a device to circumvent" the time bar of section 106 (Br. 8). But it is a "device" which the Attorney General has legitimized by regulations which permit such motions to be filed so long as the alien has not been deported (see Pet. 7). Surely the Service has no ground for objection to petitioner's use of a device supplied her by the Attorney General.

The Service also intimates (Br. 7-8, 12) that petitioner's motion lacked "good faith" and a "*bona fide* purpose" because (Br. 7) a ruling of unconstitutionality could not be "seriously expected from the Board with respect to a statute which it administers." But section 106 made application to the Board for reconsideration on constitutional grounds a prerequisite to judicial review of petitioner's

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[2] *Giova v. Rosenberg*, 379 U.S. 18.

[3] The Service (Br. 8, 12) also cites *Lopez* v. *Immigration & Naturalization Service*, 356 F.2d 986, and *Chul Hi Kim* v. *Immigration & Naturalization Service*, 357 F.2d 904. Neither is applicable. *Lopez* affirmed an administrative order denying a motion for reconsideration because the alien had presented nothing "that was not known and available to him at the hearing which resulted in the order of deportation." Here, in contrast, none of the constitutional decisions on which petitioner relies (Pet. 10-15) were known or available until long after six months from the final deportation order. *Chul Hi Kim* simply adopts the position taken by the Service in *Giova* (see Br. 9), later abandoned by it in *Woodby* (see Br. 11), that the time limitation of section 106 should be literally construed.

constitutional challenge. Petitioner cannot be guilty of bad faith for pursuing the only avenue of review open to her under the Act.[4]

As petitioner pointed out (Pet. 7-8) no such avenue is afforded by habeas corpus because the Attorney General has no authority to take her into custody for any purpose. The Service assumes that such authority exists (Br. 13, n. 14). But since the assumption is without foundation, and none is cited, the remarks of the Service (*ibid.*) about the availability to petitioner of habeas corpus prior to deportation are fatuous.[5]

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[4] The Service acknowledged below that if the proceeding were remanded to the special inquiry officer for reconsideration of the evidence of deportability in the light of the *Woodby* standard, "the remand would successfully eliminate any jurisdictional question if it ultimately were to result in a new order sustaining the deportation charge since at that time petitioner could, without question, come into this Court on a timely petition for review" (Respondent's Memorandum in Support of Motion to Dismiss, p. 10). But it would be absurd to require petitioner and the Service to go through a mock rehearing on an issue that both recognize to be frivolous (A.R. 6, 2-3; A.R. 5, 3; Pet. 4-5; Br. 3-5, ns. 3, 5, 6) in order to give the reviewing court jurisdiction over the substantial constitutional questions which petitioner's motion for reconsideration presents.

[5] While petitioner cannot be taken into custody, she would be liable to a ten year sentence for failure to present herself for deportation if deportation becomes feasible. Section 242(e). She could litigate her constitutional claim in a prosecution under that section. Section 106(a)(6). But the risk of conviction is an extortionate price for the right of judicial review. Moreover, section 242(e) has constitutional infirmities of its own, so that petitioner's challenge to the statute authorizing her deportation might not be reached. See *United States* v. *Spector*, 343 U.S. 169, 174 (dissenting opinion of Justice Jackson).

The Service also ignores the restraints on petitioner's liberty currently imposed by the order of supervision issued under section 242(d) of the Act. See Pet. 8.[6]

Thus the Service's restrictive construction of section 106 completely disregards "the vital importance of keeping open avenues of judicial review of deprivations of constitutional right." *Sibron* v. *New York*, — U.S. — (June 10, 1968). Certiorari should be granted to consider keeping these avenues open to aliens.

2. Constitutionality

The Service (Br. 7, n. 8) writes off petitioner's constitutional challenge as unimportant, stating that the "membership" test of the Statute, as construed in *Rowoldt* v. *Perfetto*, 355 U.S. 115, and *Gastellum-Quinones* v. *Kennedy*, 374 U.S. 469, "clearly comports with recent expression of constitutional standards."

This statement is patently untrue. Whatever else the *Rowoldt* standard of "meaningful association" may involve, it does not require proof that the alien knows the Communist Party to have an unlawful purpose, intends to effectuate such purpose, and engages in activity to that end. See *Gastellum-Quinones* at 473-74, 476-78. Thus the

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[6] Petitioner could secure a forum for her constitutional challenge by violating the order of supervision and incurring prosecution under section 242(d). See section 106(a)(6). But this avenue of judicial review is both objectionable and uncertain for the reasons stated in the previous footnote. Subsequent to the filing of the petition for certiorari herein, the District Court granted summary judgment for the defendant in *Dymytryshyn* v. *Esperdy*, No. 66 Civ. 2375, S.D.N.Y., in which petitioner and others sought to enjoin enforcement of the orders of supervision to which they are subject. See Pet. 8, n. 6. The plaintiffs in that case (who are represented by counsel for petitioner here) are appealing the judgment of the three judge court to this Court.

evidence of petitioner's deportability clearly satisfied the *Rowoldt* standard (R. 31). But cf. *Aptheker* v. *Secretary of State*, 378 U.S. 500 (Pet. 13), invalidating the passport sanction of the Subversive Activities Control Act both on its face and (at 515) as applied to the then chairman of the Communist Party who, like petitioner, had been convicted under the Smith Act. See *United States* v. *Flynn*, 216 F.2d 354, to which the Service refers (Br. 4, n. 3).

Moreover, neither *Rowoldt* nor *Gastellum-Quinones* touch upon the constitutional objections to the Statute which arise from its specification of the Communist Party by name. See Pet. 13-14, 15, 15 n. 19.

Finally, neither of these cases reexamined the antiquated doctrine on which *Galvan* v. *Press*, 347 U.S. 522, rests (Pet. 11-13) that aliens are without constitutional protection against deportation on any grounds that Congress may choose to specify.

Respectfully submitted,

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